NO. 20360

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GLADYS TOWLES ROOT and
GEORGE A. FORDE,

Appellees.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
DONALD A. FAREED,
Assistant U. S. Attorney,
Chief Trial Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellant,
United States of America.

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Assistant U. S. Attorney,
Chief Trial Attorney,

600 U. S. Court House,
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Los Angeles, California 90012,

Attorneys for Appellant,
United States of America.

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Except for several contentions, which appellees did not present in the court below and to which this reply brief is addressed, appellees' briefs essentially restate points briefed in their motions to dismiss [C. T. 202-231, 244-248, 251-268, 277-285] and have been dealt with in appellant's opening brief.

I

THE DISMISSAL OF THE FIRST INDICTMENT WHICH WAS DISMISSED ON THE GROUND OF INSUFFICIENCY IS NOT RES JUDICATA AS TO THE SECOND INDICTMENT.

Appellees raise this additional matter, which was not urged in the court below. They now contend that the dismissal of Counts One, Four and Five of the second indictment was required under

the rule of res judicata in that the dismissal of the first indictment was based on the failure of the Government to plead the alleged false testimony and that, as to the conspiracy and obstruction of justice counts in the second indictment (Counts One, Four and Five) the Government is estopped to contend otherwise [appellee Forde's br. pp. 24-26; appellee Root's br. pp. 12-14].

(a) In the first place, Counts One, Four and Five of the instant indictment, as appellee Forde concedes, do differ from the conspiracy and obstruction of justice counts in the first indictment [appellee Forde's br. pp. 3, 24]. As to six subject matters, the particular areas of false testimony are specifically set forth [appellant's op. br. pp. 10, 17-19, compare C. T. 2-4 and C. T. 55-59; compare C. T. 6 and C. T. 199].

(b) Assuming arguendo that Counts One, Four and Five of the second indictment are no different for purposes of the usual application of collateral estoppel in civil and criminal proceedings, the dismissal of a bad indictment is no bar to prosecution upon a good one and appellee Forde concedes he is not so contending [appellee Forde's br. p. 25]. Yet, if the rule of res judicata is applied to the dismissal of an insufficiently pled indictment, how could the Government successfully reindict on such counts? None of the cases relied upon by the appellees supports their contention. As appellees point out, Oppenheimer involved the dismissal of an indictment for conspiracy to conceal assets in bankruptcy on the ground that the offense charged was barred by the statute of limitations [appellee Forde's br. p. 25;

appellee Root's br. p. 130]. Mr. Justice Holmes stated:

> "Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as a matter of substantive law . . . a plea of the statute of limitations is a plea to the merits and however the issue was raised in the former case, after judgment upon it, it could not be re-opened in a later prosecution. . . . " (emphasis supplied).

United States v. Oppenheimer (1916), 242 U.S. 85, 87, 61 L.Ed. 161, 164.

Similarly, a reading of the other cases cited by appellees will disclose that they all involved matters competently adjudicated on the merits in the prior proceedings. De Angelo involved a robbery indictment which alleged De Angelo's presence at and participation in the robbery. The Government had offered proof in support of these allegations at the first trial. The jury had returned a verdict of acquittal as to De Angelo. At the later trial of the conspiracy indictment the court held the Government was estopped from relitigating those facts. Appellee Forde's br. p. 25, United States v. De Angelo (3rd Cir. 1943), 138 F. 2d 466.

In Stroud [appellee Forde's br. p. 25], where the matter of double jeopardy was squarely presented by the defendant and decided adversely to him by the United States Supreme Court and he later moved to vacate the sentence under 28 U.S.C. 2255,

raising the same ground of double jeopardy, the court applied the rule of res judicata. Stroud v. United States (10th Cir. 1960), 283 F. 2d 137.

Sealfon relied on by appellee Root is also inapposite in that it involved an acquittal of conspiracy to defraud the United States in connection with the sugar rationing program which was held to bar a subsequent prosecution for the substantive offense. Sealfon v. United States, 332 U.S. 575, 92 L. Ed. 180.

Judge Mathes stated the law clearly as to when a court may invoke collateral estoppel in United States v. Rangel Perez (D. C. S. D. Calif. 1959), 179 F. Supp. 619, 622. Appellee Forde's br. p. 26.

> "To be conclusive in a subsequent criminal proceeding by virtue of the doctrine of collateral estoppel the facts determined by the earlier judgment must, of course, have been fully tried and necessarily adjudicated in order to reach judgment on the issues involved in the essential elements of the crime charged."
>
> (Citing Sealfon v. United States, supra, and other cases; Anderson, "Res Judicata With Respect to Criminal Judgments," 120 N. Y. L. J. 2194 (1939), 65 H. L. R. 818, 874-880).

There was, of course, no such adjudication on the merits here and res judicata cannot be invoked.

II

APPELLEE ROOT'S CONTENTION THAT THIS COURT LACKS JURISDICTION OF THIS APPEAL IS WITHOUT MERIT [1]

Appellee Root asserts that this Court lacks jurisdiction to entertain this appeal because the indictment under submission requires a construction and interpretation of Rule 7(c) Federal Rules of Criminal Procedure [appellee Root's br. pp. 2, 9]. This argument as to the exclusive jurisdiction of the Supreme Court of the United States is based on the following provision of Title 18, Section 3731, United States Code:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

The judgment of dismissal in the District Court in the case at bar was not based upon the invalidity or construction . . . of the statutes upon which the indictment . . . was "founded", i.e.,

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1/ We note that appellee Forde concurs in the Government's statement of the Pleadings and Facts disclosing jurisdiction [appellee Forde's br. p. 1].

18 United States Code §371, §1503, §1622 [appellant's op. br. 1-2].

Hvass, the only case cited in support of appellee Root's argument is inapposite [appellee Root's br. p. 11]. In Hvass, the dismissal was based upon the District Court's holding that the local rule under which the attorney defendant took his oath was not a "law of the United States" for purposes of Title 18, U.S.C. §1621. There the dismissal directly involved and was based upon the trial court's construction of the perjury statute underlying the indictment. That, of course, is not the case here. Judge Hall's dismissal did not rest on a determination as to the reach of any of the statutes upon which the indictment was founded but rather with a deficiency in pleading [C.T. 286-288]. United States v. Borden Co., 308 U.S. 188 [appellant's op. br. p. 9]. See generally, Annotation 2 L.ed.2d 1805, 1806 and cases cited therein.

III

APPELLEE ROOT'S POINTS IX AND X RELATING TO THE BIAS AND PREJUDICE OF THE GRAND JURY ARE AN ATTEMPT TO REINSTATE A CROSS-APPEAL WHICH THIS COURT HAS DISMISSED.

The trial court based its dismissal on insufficiency of pleading and specifically rejected certain additional grounds asserted by appellee Root in support of her motion [C.T. 215, 288]. Appellees filed Notice of Cross-Appeal on the grounds rejected by the trial court [C.T. 295]. The appellant moved to dismiss the cross-appeal on the ground that appellees were not "aggrieved"

by that portion of the judgment which they sought to have reviewed and for lack of "finality" as to that portion of the judgment [see appellant's Notice of Motion to Dismiss Cross-Appeal and Points and Authorities which appellant incorporates herein by reference]. This Court, on January 3, 1966, dismissed the cross-appeal and denied appellees' petition for leave to file for Writ of Prohibition and Mandate. Notwithstanding these rulings of this Court, appellee Root now seeks in effect to relitigate these issues [appellee Root's br. pp. 52-54]. 2/ Appellant submits this matter has been fully briefed, argued and decided by this Court and requires no further reply. In the event, upon oral argument of this matter, the court indicates a disposition to consider these grounds on this appeal, appellant would request leave to file a supplemental reply brief addressed to Points IX and X raised by appellee Root.

Appellee Root asserts that the Court should strike appellant's opening brief "for failure to set out the prolix and lengthy indictment of 148 pages" [appellee Root's br. pp. 57-58]. This, of course, is absurd in that Rule 18(2)(b) refers simply to a "statement of the pleadings and facts" not the pleading itself totidem verbis. Even assuming any reasonable ground for such an assertion, appellee Root has not brought it to the attention of this court in the manner prescribed by the very rule under which she claims appellant's brief is "fatally defective" [appellee Root's

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2/ While not adopting or arguing these grounds asserted by appellee Root, appellee Forde by footnote joins appellee Root in urging that this Court is not precluded from consideration of these grounds [appellee Forde's br. p. 5, fn. 2].

br. pp. 58-59], Rule 18(2)(b)(7) Rules of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,

J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

DONALD A. FAREED,
Assistant U. S. Attorney,
Chief Trial Attorney,

Attorneys for Appellant,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Donald A. Fareed

DONALD A. FAREED